Carroll College, Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW, Petitioner. Case 30-RC-6594

August 26, 2005

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The issue presented in this case is whether the Employer, a private liberal arts college "affiliated" with the Presbyterian Church that expressly concedes that it is an employer within the meaning of Section 2(2) of the Act, is nevertheless exempt from application of the Act by virtue of the Religious Freedom Restoration Act (RFRA).[1] On January 13, 2005, the Acting Regional Director for Region 30 issued a Decision and Direction of Election in the above-entitled proceeding. Following the Board's decision in *University of Great Falls*,[2] where the Board stated that RFRA does not require the Board to alter the analysis that it has consistently undertaken under *NLRB v. Catholic Bishop of Chicago*[3] in determining whether the assertion of jurisdiction over an employer would involve a significant risk of infringement of First Amendment rights, the Acting Regional Director concluded that asserting jurisdiction over the Employer would not violate the First Amendment. Consequently, the Acting Regional Director determined that he need not address the Employer's RFRA claim.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review. The Employer contended, inter alia, that the Acting Regional Director erred by not directly addressing its claim that application of the Act to it would substantially burden its free exercise of religion under RFRA, but instead analyzing whether the Board has jurisdiction over it under *Catholic Bishop*, supra. The Employer expressly conceded that under *Catholic Bishop* it is subject to the Board's jurisdiction.

By Order dated May 11, 2005, the Board granted the Employer's request for review solely with respect to the Acting Regional Director's application of RFRA.[4] The election was conducted as scheduled on February 11, 2005, and the ballots were impounded pending the Board's Decision on Review. The Petitioner and the Employer filed briefs on review.[5] An amicus curiae brief was also filed.[6]

In accordance with the decision of the United States Court of Appeals for the District of Columbia Circuit in *NLRB v. University of Great Falls*,[7] we disavow the Board's decision in *University of Great Falls* to the extent that it can be read to conflate the analysis of a RFRA claim with the analysis of a *Catholic Bishop* jurisdictional exemption claim.[8] Consistent therewith and contrary to the Acting Regional Director, we independently consider the Employer's RFRA claim. Having carefully considered the entire record in this proceeding, including the briefs on review and amicus curie brief, we conclude that application of the Act to the Employer does not violate RFRA. Thus, we affirm the Acting Regional Director's decision for the reasons set forth below.

I. FACTS

The Employer, Carroll College, is a private coeducational liberal arts college located in Waukesha, Wisconsin. The College is divided into two schools: the school of liberal arts and science and the school of graduate and professional studies. The College offers 35 liberal arts and professional majors and in the fall of 2003 had an enrollment of 2986 students. There are 104 faculty members in the petitioned-for unit.

Soon after the College was established in 1846, it "affiliated" with the Presbyterian Church. Today, that affiliation is recognized in the Articles of Incorporation, which provide that the College is "related" to the Synod

[1] 42 U.S.C. § 2000bb-1.

[2] 331 NLRB 1663 (2000), enf. denied 278 F.3d 1335 (D.C. Cir. 2002).

[3] 440 U.S. 490 (1979).

[4] The Board denied the Employer's request for review of the Acting Regional Director's finding that the Employer's faculty are not managerial employees within the meaning of *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), or supervisors within the meaning of Sec. 2(11) of the Act. The Board also denied review of the Acting Regional Director's determination that the Employer's librarians should be permitted to vote subject to challenge because there was insufficient evidence to determine whether they should be included in the unit.

[5] The Employer's request for oral argument is denied as the record and briefs adequately present the issues and the positions of the parties.

[6] On June 30, 2005, the Board granted the request of the Linda Loma University Medical Center, Adventist Health, and Adventist Health System Sunbelt Healthcare Corporation to file an amicus brief and accepted the brief that accompanied the request.

[7] 278 F.3d 1335 (D.C. Cir. 2002).

[8] Because the Employer has not contested the Board's assertion of jurisdiction, we need not pass on the D.C. Circuit's rejection of the Board's test for determining whether an educational institution is exempt from the Board's jurisdiction under *Catholic Bishop*, supra. *University of Great Falls*, 278 F.3d at 1343.

of Lakes and Prairies of the United Presbyterian Church (the Church).[9]

The College and the Church are parties to a covenant, which they renew periodically. The College's president, Frank Falcone, described the covenant as "broad" and testified that it is "a general agreement on general principles" that the College and the Church share. More specifically, the covenant commits the board of trustees to the following: (1) "recognize and affirm its origin and heritage in the concern of the Church for intellectual and spiritual growth of its students, faculty, administration, and staff;" (2) "offer education of high quality committed to the wholeness of life interpreted and illumined by the Christian faith;" (3) continue to be a liberal arts institution that offers classes with a goal of academic excellence; (4) relate to the whole Church; (5) recognize opportunity to provide leadership to the Church; (6) administer church gifts faithfully; (7) be nondiscriminatory in its admissions and employment policies; and "seek to instill in its students the ideals of rigorous pursuit of truth, freedom of thought and investigation, and respect for differing opinions;" (8) be maintained and perpetuated to merit regional and national recognition for quality leadership; and (9) nominate and elect at least one Presbyterian minister in each elected class of the board of trustees.

The College's mission statement, approved by the board of trustees in 1995, provides in full:

- We will provide a superior educational opportunity for our students, one grounded in the liberal arts tradition and focused on career preparation and lifelong learning.
- We will demonstrate Christian values by our example.
- We shall succeed in our mission when our graduates are prepared for careers of their choice and lives of fulfillment, service and accomplishment.

The board of trustees also adopted a Statement of Christian Purpose. The statement provides in part:

> The Christian purpose of Carroll College is summarized in its motto "Christo et Litteris"—for Christ and Learning. By means of a faculty dedicated to the Christian purpose and assured of the academic freedom necessary to the performance of its tasks, the college seeks to provide a learning community devoted to academic excellence and congenial to Christian witness. To this learning community, the college welcomes all inquirers.

The College's president testified that the statement "is an attempt to clarify that the Christian values are the underpinning of the institution but to recognize that inquiry will take us in a lot of different directions and people should feel free to speak their minds." The Carroll Compact, which defines "the values and expectations of the college community," and is published in the annual course catalog, makes no reference to the Church or any other organized religion.

The Church does not exert any type of administrative control over the College. The board of trustees is the chief governing entity of the College. Currently, there are 33 members of the board of trustees, including the College's president and alumni College president. The trustees serve 3-year terms. Trustees are not required to be Church members. The board of trustees is self-selected, so the Church has no power to nominate or elect any trustees. The bylaws direct that the trustees must elect three Presbyterian ministers to the board. Currently, there is one Presbyterian minister on the board, and the College is seeking to fill the other two vacancies. The bylaws direct that trustee nominees should "respect the Christian commitment and will seek to maintain the Christian ideals and purposes of the college." President Falcone testified that this is a subjective requirement.

The College's articles of incorporation prohibit the establishment of any requirements that limit the admission of students, election of trustees, or appointment of faculty to members of the Presbyterian denomination. Additionally, there is no evidence that faculty are required to subscribe to the Christian faith or to teach or promote the goals or values of the Church or Christianity in general. In fact, President Falcone testified that "all are free to speak their minds" and that the College would not exclude from the faculty anyone who held a world view different from the Christian world view. To this extent, there is also no evidence that the Church could require dismissal of faculty for engaging in conduct contrary to its teachings, or for advocating ideas contrary to Christianity or the Presbyterian Church.

There is no evidence that students are required to attend religious services. There is also no evidence that the Church exercises any influence over course content or book selection. While the College, pursuant to the articles of incorporation, requires students to take one religious course (4 credits) to graduate, the administration and faculty have interpreted this requirement

[9] The Synod of Lakes and Prairies of the United Presbyterian Church is a clustering of Presbyterian Churches in the upper midwest that have joined together to agree on a broad set of common values, goals, and charitable endeavors. Eight colleges are currently affiliated with the Synod.

broadly. Students may satisfy the requisite course by taking and passing classes that deal with values and ethics but are not specifically within the religious studies curriculum. Some examples of classes that students may take to complete the religious course requirement include "Bioethics," "Literature in Black America," and "Playing Crazy: Cultural Constructions of Madness."

The College is not financially dependent on the Church. The majority of the College's revenue, approximately 70 percent, comes from student tuition. The remaining revenue is derived from fundraising and endowment draw. There is no evidence that any of the College's revenue comes from the Church. The College owns the property on which it is located.

II. ANALYSIS

A. Revision of the Appropriate Legal Standard for Analyzing RFRA Claims

1. Background

Prior to 1990, courts occasionally utilized a balancing test whereby State or governmental actions that substantially burdened the free exercise of religion could only be justified if they were the least restrictive means of achieving a compelling governmental interest. See, e.g., *Sherbert v. Verner,* 374 U.S. 398 (1963); *Wisconsin v. Yoder,* 406 U.S. 205 (1972). However, in the landmark case of *Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), the Supreme Court held that the free exercise clause of the First Amendment is not violated by the enforcement of a generally applicable neutral law (i.e., one that passes through duly elected legislatures with a neutral purpose) that burdens religious conduct. In particular, the Court rejected the contention that such an application of law was unconstitutional absent a showing of a compelling government interest.

In direct response to the Court's decision in *Smith,* supra, Congress enacted RFRA. In RFRA, Congress sought to restore the "compelling interest" standard that had been applied in *Sherbert,* supra, *Yoder,* supra, and several other pre-*Smith* free exercise decisions. RFRA applied to every law in the United States and provided that: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." RFRA was subsequently declared unconstitutional by the Supreme Court in *City of Boerne v. Flores,* 521 U.S. 507 (1997).[10] The Court held that Congress lacked the authority under Section 5 of the Fourteenth Amendment to impose RFRA on State and local Governments, and therefore RFRA was unconstitutional as applied to State and local law.

Since *Boerne,* supra, the debate over RFRA has shifted to whether it is constitutional as applied to Federal law.[11] Appellate courts that have squarely addressed the question have held that RFRA governs the activities of Federal officers and agencies.[12] However, other appellate courts and commentators continue to doubt RFRA's validity.[13] Nevertheless, in *University of Great Falls,* supra, the Board assumed that RFRA is constitutional as applied to the Act and Board proceedings. See also *Ukiah Valley Medical Center,* 332 NLRB 602 fn. 3 (2000). We do the same here.

2. The Board and court's decision in *University of Great Falls*

In *University of Great Falls,* 331 NLRB 1663 (2000), enf. denied 278 F.3d 1335 (D.C. Cir. 2002), unlike the current case, the employer claimed both that it was exempt from the Board's jurisdiction under *Catholic Bishop,* supra, and that application of the Act to it would violate RFRA. Relying on *Jewish Day School of Greater Washington,* 283 NLRB 757 (1987), and its progeny, the Board found that it was proper to assert jurisdiction under *Catholic Bishop*. The Board also addressed the employer's RFRA claim as follows.

The Board found that the threshold question in determining whether there has been a violation of RFRA is whether the assertion of jurisdiction over the employer

[10] *Boerne* involved local land use law applied to a Catholic church in Boerne, Texas, that sought a building permit to demolish the entire structure in order to build a larger structure. The city denied the application pursuant to an ordinance requiring preapproval by the Boerne Historic Landmark Commission. Archbishop Flores sued on the basis of RFRA to trump the local land use law.

[11] Recently, in *Cutter v. Wilkinson,* 125 S.Ct. 2113 (2005), a case involving the constitutionality of sec. 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1(a)(1)–(2), the Supreme Court remarked that it has not had the occasion to rule on the constitutionality of RFRA as applied to the Federal Government. *Cutter v. Wilkinson,* 125 S.Ct. at 2118 fn. 2.

[12] See *Guam v. Guerrero,* 290 F.3d 1210, 1221 (9th Cir. 2002); *Henderson v. Kennedy,* 265 F.3d 1072, 1073 (D.C. Cir. 2001); *Kikumura v. Hurley,* 242 F.3d 950, 958 (10th Cir. 2001); *Young v. Crystal Evangelical Free Church,* 141 F.3d 854, 856 (8th Cir. 1998); *O'Bryan v. Bureau of Prisons,* 349 F.3d 399 (7th Cir. 2003).

[13] See *La Voz Radio de la Communidad v. F.C.C.,* 223 F.3d 313 (6th Cir. 2000) ("Assuming for the sake of argument that RFRA is constitutional as applied to the federal government . . . which we doubt."); *U.S. v. Grant,* 117 F.3d 788, 792 n. 6 (5th Cir. 1997) (noting doubt as to continued viability of RFRA in federal context). See also Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period,* 1 U. Pa. J. Const. L. 1 (1998).

would result in a "substantial burden" on the employer's free exercise of its religion. In the free exercise area, the Board follows the Supreme Court's decision in *Catholic Bishop*, which held that the Board could not assert jurisdiction over lay teachers in church-operated schools because to do so would create a "significant risk" that First Amendment rights would be infringed. *Catholic Bishop*'s requirement that the Board avoid even a "significant risk of infringement," is, according to the Board's opinion in *University of Great Falls*, a stricter standard than the "substantial burden" standard set forth in RFRA. Therefore, the opinion assumed, RFRA does not require the Board to alter the analysis that it has consistently undertaken under *Catholic Bishop* in determining whether the Board's assertion of jurisdiction over an employer would involve a significant risk of infringement of First Amendment rights. The Board opined that inasmuch as RFRA prohibits only those governmental actions that "substantially burden" the free exercise of religion, it follows that when the Board applies *Catholic Bishop* and finds that the exercise of the Board's jurisdiction over an employer involves no significant risk of infringement of religious rights, RFRA's purposes have been considered and satisfied, as well. The Board found that the employer was not involved with a religious institution in such a way that the Board's exercise of jurisdiction would create a significant risk that First Amendment rights would be infringed. Thus, the Board's assertion of jurisdiction over the employer also would not "substantially burden" its free exercise of religion under RFRA. Consequently, the Board concluded that it need not address whether the assertion of jurisdiction was the least restrictive means of achieving a compelling governmental interest. *University of Great Falls*, 331 NLRB at 1665–1666.

Subsequently, the D.C. Circuit rejected the Board's interpretation of *Catholic Bishop* and declined to enforce the Board's Order. The Court rejected the Board's "substantial religious character" test and instead adopted the tripartite test suggested by then-Judge Breyer in his plurality opinion in *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1985) (en banc). See *NLRB v. University of Great Falls*, 278 F.3d 1334, 1340–1344 (D.C. Cir. 2002). Applying that tripartite test, the Court concluded that the Board did not have jurisdiction for the reasons discussed by the Supreme Court in *Catholic Bishop*. Thus, the Court did not need to reach the university's claim that the application of the Act to it would violate RFRA. However, it explicitly asserted as follows:

> Contrary to the Board's view that "RFRA does not require the Board to alter the analysis that it has consistently undertaken under *Catholic Bishop*," *Great Falls*, 331 NLRB No. 188, at 3 [1663–1665], RFRA presents a separate inquiry from *Catholic Bishop*. Under *Catholic Bishop*, the NLRB must determine whether an entity is altogether exempt from the NLRA. We have laid forth a bright-line test for the Board to use in making this determination. However, a ruling that an entity is not exempt from Board jurisdiction under *Catholic Bishop* may not foreclose a claim that requiring that entity to engage in collective bargaining would "substantially burden" its "exercise of religion." 42 U.S.C. § 2000bb-1(a). Moreover, even if the act of collective bargaining would not be a "substantial burden," RFRA might still be applicable if remedying a particular NLRA violation would be a "substantial burden." As none of these questions are properly before us, we need not explore them further. [*University of Great Falls*, 278 F.3d at 1347.]

3. Revised approach

We accept the D.C. Circuit's analysis that a ruling that an entity is not exempt from Board jurisdiction under *Catholic Bishop* does not automatically foreclose a RFRA claim that requiring that entity to engage in collective bargaining would "substantially burden" its exercise of religion.[14] Accordingly, we disavow the Board's decision in *University of Great Falls* to the extent that it can be read to conflate the analysis of a RFRA claim with analysis of a *Catholic Bishop* jurisdictional exemption claim. If a party brings a RFRA claim before the Board, we will analyze it independently of any *Catholic Bishop* exemption claim.[15]

RFRA provides that: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling gov-

[14] Cf. *Ukiah Valley Medical Center*, 332 NLRB 602 (2000) (the Board statutorily authorized to assert jurisdiction over hospital operated by the Seventh-day Adventist Church; however, based on the religious practices of the Adventists which prohibit its members from participating in labor unions, paying dues to labor unions, or operating within the presence of labor unions, the Board assumed that requiring the Adventists to bargain with a union would constitute a "substantial burden" on their free exercise of religion but nonetheless found that application of the Act furthers a compelling governmental interest and is the least restrictive means of furthering that interest). Chairman Battista and Member Schaumber did not participate in *Ukiah* and find it unnecessary to pass on all aspects of *Ukiah*'s holding.

[15] In fact, in this case, the Board has no choice but to analyze the Employer's RFRA claim separately because, as mentioned above, the Employer has not contested the Board's assertion of jurisdiction under *Catholic Bishop*, supra.

ernmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b). Therefore, to establish a prima facie case under RFRA's substantial burden/compelling interest/least restrictive means framework, a claimant must show that application of the Act will substantially burden its ability to freely exercise its sincere religious beliefs. The burden of proof is on the claimant to show a substantial burden. See *Diaz v. Collins*, 114 F.3d 69, 71–72 (5th Cir. 1997). Only if the claimant carries this burden, will the Board, under RFRA, have to establish that the Act serves a compelling governmental interest and that application of the Act is the least restrictive means of accomplishing that compelling interest.

While RFRA does not define what constitutes a "substantial burden" on the exercise of religion,[16] Section 2000bb-(b)(1) of RFRA explains that a purpose of RFRA is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened[.]" This language, as well as the legislative history, instructs that "substantial burden" should be interpreted by reference to Supreme Court jurisprudence. See S. Rep No. 111, 103d Cong., 1st Sess. at 8 (1993). A definition derived from the Supreme Court's pre-*Smith* decisions is that a substantial burden arises when the Government compels a religious adherent to engage in conduct that his religion forbids or prevents him from engaging in conduct that his religion requires. See *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 140–141 (1987); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Stated differently, a substantial burden exists when the Government's regulation puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]" *Thomas v. Review Board of Indiana Employment Section Division*, 450 U.S. 707, 717–18 (1981).

The "substantial burden" inquiry is plainly different from the *Catholic Bishop* "significant risk" inquiry under which the Board must determine whether an entity is altogether exempt from the Board's jurisdiction.[17]

B. Application of RFRA to the Employer

We find that the Employer has not carried its burden of proving that application of the Act would substantially burden its free exercise of religion.[18]

Should the Petitioner become certified as the collective-bargaining representative of the Employer's faculty, the Employer will be legally obligated to bargain with the Petitioner in good faith or risk legal sanctions under the Act. The Employer argues that requiring it to bargain with the Petitioner will substantially burden its free exercise of religion because it will interfere with its right to decide autonomously whether faculty members are satisfactorily conforming to the Protestant theological tradition and, more specifically, to the tenets of the "reformed" Presbyterian Church.[19] This contention, however, is not supported by the evidence.[20]

First, based on the record, the Employer has not carried its burden of demonstrating that a bargaining obligation would place a substantial burden on it with regard to the interaction between the faculty's educational conduct and content and the University's religious commitment. In fact, despite the general pronouncements set forth in some of the Employer's constitutive documents that ap-

[16] RFRA had defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4) (1999). The Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No.106-274, §§ 7–8, 114 Stat. 803, 806 (2000), altered the definition to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A), *incorporated by* 42 U.S.C. § 2000bb-2(4).

[17] In analyzing the RFRA claim in *University of Great Falls*, supra, the Board applied *Catholic Bishop*, supra. To this end, because *Catholic Bishop* predated *Smith*, supra, the Board thought that it was following Congress' directive to "look to the free exercise cases prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened." *University of Great Falls*, 331 NLRB at 1664, citing S. Rep No. 111, 103d Cong., 1st Sess. at 8 (1993). The pre-*Smith* cases that Congress referred to in RFRA's text and legislative history were the handful of cases where the Court applied the *Sherbert* test and said that governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest and must be the least restrictive means of furthering that compelling governmental interest. See 42 U.S.C. § 2000bb-(a)–(b)(1). By enacting RFRA, Congress sought to restore that standard. Id. *Catholic Bishop*, however, does not fall within this line of cases. Its framework is not analogous to RFRA's substantial burden/compelling interest/least restrictive means framework; therefore, the case is not controlling in analyzing RFRA claims.

[18] In its Brief on Review, the Employer contends that under RFRA, the Board cannot apply the Act to it "unless the Board can conclude that the evidence demonstrates that it is more probable than not that this substantial cost burden imposed on Carroll is necessary to the realization of the secular values of the NLRA and, in addition, application of the NLRA in this context is the only means by which these values can be realized." The Employer, thus, erroneously imports a balancing test into the RFRA analysis without any support. As discussed above, RFRA utilizes a burden shifting analysis. Moreover, the Board has no obligation to demonstrate the value of applying the Act to the Employer, unless and until the Employer demonstrates that such application constitutes a substantial burden.

[19] Put another way, the Employer argues that requiring it to bargain with the Petitioner will substantially burden its free exercise of religion because it will interfere with its right to decide whether the faculty is "discharging the Christian objectives and purpose of the institution."

[20] The Employer bases its entire RFRA argument on testimony of President Falcone in response to questions asked by its counsel. It is telling that these questions and answers fill less than 2 pages of the otherwise thorough 874-page record.

pear in the record and are outlined above, the Employer's free exercise rights are not implicated in this case. There is nothing in the record to indicate that the Employer uses any religious criteria in its hiring process or decisions or that faculty members must agree to any particular statement of beliefs. In fact, the Employer's Articles of Incorporation specifically prohibit discrimination in admissions and employment decisions based on religion. Furthermore, there is nothing in the record to indicate that a faculty member was ever disciplined, dismissed, or denied tenure, a promotion, or a merit-based salary increase for engaging in conduct contrary to the teachings of the Church, or for advocating ideas contrary to Christianity or the Presbyterian Church. Indeed, President Falcone testified that the Employer is tolerant of views that may not conform to Presbyterian theological world views and that as a result faculty members are free to speak their minds.

Second, and more importantly, the Petitioner is not yet certified as the faculty's collective-bargaining representative and consequently, no specific religion-based conflicts have emerged.[21] Hypothetical transgressions advanced by the Employer or the mere potential for transgression is not enough to satisfy RFRA's substantial burden component. The burden must be "a demonstrable reality," not merely a speculative possibility, *Beck v. Washington*, 369 U.S. 541, 558 (1962), and compliance with the regulation must be directly contrary to the claimant's religious beliefs. *Wisconsin v. Yoder*, 406 U.S. at 214–2115. As a result, at this stage, the proper inquiry before us is whether the broad requirement that the Employer bargain in good faith with the Petitioner upon certification, without more, violates RFRA.[22] We conclude that it does not. While the collective-bargaining process will undoubtedly result in some impact on the Employer's operation, that is the case for any employer obligated to bargain with a union.[23] The process does not, however, in and of itself, substantially burden the Employer's free exercise of religion.[24]

Requiring the Employer to bargain in good faith with the Petitioner, upon certification, would not substantially burden its free exercise of religion. Under First Amendment law, courts (and administrative agencies) are not obliged to determine the truth or falsity of any tenet of religious doctrine. *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. at 144 fn. 9. Nevertheless, in order to make out a threshold RFRA claim (i.e., that the general bargaining obligation that accompanies a certification of representative would facially violate RFRA), a claimant must offer evidence to indicate what the practices and underlying tenets of its faith are and how requiring it to collectively bargain with a union would conflict with those practices and tenets and therefore be a substantial burden on its free exercise of religion.[25] In this case, the Employer did not offer a single piece of evidence to indicate what the tenets of the Presbyterian faith are and how requiring it to collectively bargain with the Petitioner would conflict with those tenets and hence be a substantial burden on its free exercise of religion. The Employer argues that because it is a "Presbyterian Protestant College . . . there is no dogma or particular 'Faith' to propagate." However, accepting the Employer's assertion as true, this does not excuse the Employer from producing evidence to satisfy its burden of proving that its free exercise of religion will be substantially burdened by application of the Act. This case is in stark contrast with *Ukiah*, supra, where the Employer offered voluminous evidence to demonstrate that the teachings of the Adventist faith prohibit Adventist institutions, such as Ukiah, from recognizing or bargaining with unions. *Ukiah*, 332 NLRB at 603, 607–609.

The Employer contends that to deny its RFRA claim would require us to question the sincerity of its religious mission. The Employer is incorrect. Indeed, we accept the Employer's assertion that its constitutive documents establish that it has a sincerely held purpose to instill Christian values in its students. However, we find that the Employer failed to carry its burden of showing that any practices in furtherance of this sincerely held purpose would be substantially burdened by application of the Act.

Nor will application of the Act compel the Employer to engage in conduct that its religion forbids or prevent it from engaging in conduct that its religion requires. Indeed, the Employer does not claim that Presbyterian doctrine forbids collective bargaining or requires it to engage

[21] See *Tressler Lutheran Home v. NLRB*, 677 F.2d 302, 306 (3d Cir. 1982).

[22] See *Tressler Lutheran Home v. NLRB*, 677 F.2d at 306. The Board will apply the same analysis if the Petitioner is ultimately certified as the employees' representative and the Employer subsequently contests the Petitioner's certification by refusing the Petitioner's request to bargain. At that point, since no bargaining would have taken place, no potential religious based conflict would have emerged. See id.

[23] See *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436, 1442 (9th Cir. 1983).

[24] See *EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980). ("[T]he relevant inquiry is not the impact of the statute upon the institution, but the impact of the statute upon the institution's exercise of its sincerely held religious beliefs.").

[25] It should be noted that the Employer does not claim that the Board's inquiry itself interferes with the free exercise of its religion. To the extent that the inquiry itself is a concern, it raises a concern regarding the constitutionality of RFRA. As discussed above, we assume RFRA's constitutionality.

in unfair labor practices. Compare, *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d at 1443 (the Board asserts jurisdiction and court affirms finding no substantial burden and therefore no free exercise violation remarking that, "Catholic doctrine does not counsel St. Elizabeth to commit unfair labor practices or to refuse to bargain with a labor union"), and *Tressler Lutheran Home v. NLRB*, 677 F.2d at 306 (same for Lutheran religion) *with Ukiah Valley Medical Center*, 332 NLRB 602 (the Board assumed that asserting jurisdiction over a hospital operated by the Seventh-day Adventist Church and thereby requiring it to bargain with the union was a substantial burden because the Church's teachings prohibit its members from participating in labor unions, paying dues to labor unions, or operating within the presence of labor unions). Additionally, there is no evidence that the fact that the Employer may have to bargain with the Petitioner puts pressure on the Employer to modify its religious behavior or to violate its beliefs.

We recognize that a certification of the Petitioner would mean that terms and conditions of employment would no longer be subject to the Employer's unilateral control. However, there is nothing on this record to suggest that the Petitioner would wish to bargain about matters which, in the Employer's view, relate to its fundamental Christian purpose. Thus, we need not pass on the hypothetical issue that could arise if the Union were to seek bargaining on such a matter and the Employer were to refuse. Suffice it to say that the issue of mandatory versus permissive subjects of bargaining is a difficult one, and we would not here speculate that the subject would be mandatory. In short, it would be premature to deny jurisdiction because of the hypothetical possibility that the fundamental religious Christian purpose of the Employer would be subjected to the bargaining process.

On the record before us, the Employer cannot exempt itself at the very threshold of the Act's application. It has not shown that the Board's certification of the Petitioner as the exclusive bargaining representative of its faculty and the resultant generally applicable employer-employee bargaining responsibility would substantially burden its free exercise of religion. Accordingly, we need not address RFRA's additional requirements that any such burden further a compelling governmental interest and must be the least restrictive means of furthering that interest.

III. CONCLUSION

The D.C. Circuit's opinion in *NLRB v. University of Great Falls*, supra, has led us to reexamine our analysis of RFRA claims. We agree that RFRA presents a separate inquiry from *Catholic Bishop*, supra, and therefore RFRA claims should be separately and directly addressed. A ruling that an entity is not exempt from Board jurisdiction under *Catholic Bishop* may not foreclose a claim that requiring that entity to engage in collective bargaining would substantially burden its exercise of religion. Consequently, we disavow the Board's decision in *University of Great Falls* to the extent that it can be read to conflate the analysis of a RFRA claim with analysis of a *Catholic Bishop* jurisdictional exemption claim. Nevertheless, having carefully considered the entire record in this proceeding, we ultimately conclude that application of the Act to the Employer does not violate RFRA. The Employer has not shown that application of the Act will substantially burden its ability to freely exercise its sincere religious beliefs in any way. As a result, we affirm the Acting Regional Director's decision for the reasons stated herein and remand this case to him for further appropriate action.

ORDER

The Acting Regional Director's Decision and Direction of Election is affirmed. This proceeding is remanded to the Acting Regional Director for further appropriate action consistent with this Order.

Dated, Washington, D.C. August 26, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD